Poh Geok Sing v HB Enterprise Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S–02–277 OF 1996
GOPAL SRI RAM, HASHIM YUSOFF AND ZALEHA ZAHARI JJCA
30 NOVEMBER 2005

Contract — Breach — Remedies — Restitution — For benefit of contract breaker — Whether court wrong to order assessment of damages for work done by contract breaker — Whether court had jurisdiction to order innocent party to return to the contract breaker any advantage that the innocent party may have obtained under the contract — Whether provision in the contract permitted contract breaker to take advantage of its own breach

Contract — Damages — Assessment — Breach of contract — Whether court wrong to order assessment of damages for work done by contract breaker — Whether court had jurisdiction to order innocent party to return to the contract breaker any advantage that the innocent party may have obtained under the contract — Whether provision in the contract permitted contract breaker to take advantage of its own breach

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The defendant owned a ¾ undivided share in a piece of land. His co-proprietor was one Monica Goh. She owns the other 1/4 share. As for his 3/4 portion of the subject land, the defendant prepared a plan dividing it into three sections. The defendant wanted to develop only one of these three sections. He entered into a joint venture agreement with the plaintiff, a housing developer, to carry out the development. The defendant also executed a power of attorney in the plaintiff's favour. By its terms the defendant conferred on the plaintiff wide powers to deal with the land. Construction commenced in 1982 but halted in November 1984. The project was never completed because part of the construction encroached onto Monica Goh's portion. Then, on 1 August 1990, the defendant's solicitors after several unsuccessful correspondence with the plaintiff, wrote stating that as the plaintiff had failed to see the defendant nor resumed construction, the joint venture agreement was to be treated as having been terminated by repudiation. Later, the plaintiff issued writ. The defendant delivered his defence and counterclaim. At the trial, a substantial volume of oral and documentary evidence was produced before the judge. A variation agreement had been prepared in draft and which the defendant was said to have unreasonably refused to accede to. The learned judge who tried the case held that the defendant's termination of the joint venture agreement was justified and therefore lawful. He awarded the defendant damages, but he also went on to direct an assessment of the work that the plaintiff had done and ordered the defendant to pay the assessed value. The defendant appealed against this part of the judge's order. The plaintiff had appealed against the dismissal of its claim. It was submitted for the plaintiff that it

could do nothing, without the defendant's cooperation, as regards the submission of the appropriate plan to the Municipal Council after the issue of encroachment arose. The defendant, on the other hand, submitted that the learned judge was wrong in directing an assessment of damages for the work done by the plaintiff. It was argued for the plaintiff that the court had jurisdiction to order the innocent party to return to the contract breaker any advantage that the innocent party may have obtained under the contract.

Held, allowing the defendant's appeal and dismissed the plaintiff's appeal:

(1) Most cases of breach of contract are fact sensitive. In other words, they turn on the individual facts of each case. They turn on the impression created by particular witnesses on the mind of a judge who makes his findings of fact based on the audio visual advantage he enjoys. This is just such a case (see para 6).

(2) The plaintiff's case was that the problem about the encroachment arose because of the defendant's failure to have a proper plan showing the demarcation between the defendant's portion and that of Monica Goh. Counsel for the defendant was however able to demolish the plaintiffs case by reference to the contemporaneous documentary evidence. It was showed that the plaintiff had, through a land surveyor, caused to be prepared the subdivision plans with respect to the defendant and his co-proprietor, Monica Goh. Therefore, the defendant well knew where the boundary lay between the defendant's part of the land and that of Monica Goh. So, if there was an encroachment, it could not, on a balance of probabilities, have been the result of anything the defendant did or omitted to do. As found by the learned judge at first instance, the blame must fall squarely at the plaintiff's door. This was plainly a question of fact (see para 7).

(3) The defendant had very good reasons for refusing to agree to the terms of the proposed variation agreement. They were plainly unfavourable to him. The defendant was, on the facts of this case, entirely justified in refusing to execute the variation agreement (see para 8).

(4) The learned judge was correct that the defendant was justified in terminating the joint venture agreement and holding the plaintiff in breach of contract. There was accordingly no merit in the plaintiff's cross appeal (see para 9).

(5) Section 55 of the Contracts Act 1950 has no application to the facts of this case. The defendant had given a power of attorney to the plaintiff. By virtue of cll 9 and 10 of that power, the plaintiff could act without the defendant's cooperation. So this was not a contract where the plaintiff's promise could not be performed, or its performance claimed without the defendant fulfilling his promise. The plaintiff had sole control over matters pertaining to planning and subdivision and there was nothing further for the defendant to do in respect of these matters (see para 11).

(6) A contract breaker must pay damages to the innocent party. However, if he has made any payment under the contract (not being a true deposit for the purchase of movable or immovable property), the contract breaker is entitled

to set off that payment against the damages he has to pay. However, he cannot seek to recover any benefit he may have conferred upon the innocent party where he is himself guilty of a breach of contract. Were it otherwise, a contract breaker will be in a position to take advantage of his own wrong. This is against principle and the policy of the law (see para 19). Also in the present instance there was no express provision in the joint venture agreement which permits the plaintiff to take advantage of its own breach (see para 20).

[Bahasa Malaysia summary

Defendan memilik ¾ daripada bahagian sebidang tanah yang belum dibahagikan. Pemilik bersamanya adalah Monica Goh. Beliau memiliki ¼ bahagian yang lain itu. Berkaitan bahagian ¾ beliau ke atas tanah tersebut, defendan telah menyediakan pelan untuk membahagikannya kepada tiga bahagian. Defendan ingin memajukan hanya salah satu daripada tiga bahagian itu. Beliau telah memasuki satu perjanjian usahasama dengan plaintif, pemaju perumahan, untuk melaksanakan pembangunan tersebut. Defendan juga telah membuat satu surat kuasa wakil bagi pihak plaintif. Berdasarkan terma-termanya, defendan memberikan plaintif kuasa luas untuk mengendalikan tanah itu. Pembangunan telah bermula pada tahun 1982 tetapi tertangguh pada bulan November 1984. Projek itu tidak siap kerana sebahagian daripada pembangunan itu memasuki bahagian Monica Goh. Berikutan itu, pada 1 Ogos 1990, peguam defendan selepas beberapa kali tidak dapat menghubungi plaintif, telah menulis dan menyatakan oleh sebab plaintif telah gagal untuk berjumpa dengan defendan maupun menymbung pembangunan itu, erjanjian usahasama itu dianggap telah ditamatkan oleh penolakan. Kemudian, plaintif telah mengeluarkan satu writ. Defendan telah menyampaikan pembelaan dan tuntutan balasnya. Semasa perbicaraan, banyak keterangan secara lisan dan dokumentar yang penting telah dikemukakan di hadapan hakim. Suatu perjanjian variasi telah disediakn secara draf dan defendan dikatakan secara tidak munasabah enggan menyempurnakannya. Hakim yang bijaksana yang membicarakan kes tersebut memutuskan bahawa pembatalam perjanjian usahasama oleh defendan adalah dijustifikasikan dan sah di sisi undang-undang. Beliau mengawardkan defendan ganti rugi, tetapi juga mengarahkan satu penaksiran kerja-kerja yang plaintif telah lakukan dan memerintahkan defendan membayar nilai yang ditaksirkan. Defendan telah merayu terhadapa bahagian perintah hakim ini. Plaintif telah merayu terhapda tuntutannya yang ditolak. Adalah dihujahkan menyebelahi plaintif bahawa ia tidak boleh berbuat apa-apa, tanpa kerjasama defendan, berkaitan hujah tentang pelan yang bersesuaian kepada Majlis Perbandaran selepas persoalan pencerobohan timbul. Defendan, sebaliknya, berhujah bahawa hakim yang bijaksana terkhilaf apabila mengarahkan satu penaksiran ganti rugi untuk kerja-kerja dibuat oleh plaintif. Adalah dihujahkan menyebelahi plaintif bahawa mahkamah mempunyai bidang kuasa untuk memerintahkan pihak yang tidak bersalah untuk mengembalikan kepada pelanggar kontrak apa-apa yang mungkin pihak yang tidak bersalah telah pelolehi di bawah kontrak itu.

Diputuskan, membenarkan rayuan defendan dan menolak rayuan plaintif:

(1) Kebanyakan kes perlanggaran kontrak mempunyai fakta yang sensitif. Dalam

perkataan lain, setiap kes mempunyai fakta tersendiri. Ia berdasarkan andaian yang dibentuk oleh saksi-saisk tertentu terhadap pemikiran hakim yang membuat penemuan fakta beliau berdasarkan kelebihan audio visual yang beliau nikamti. Ini adalah satu daripada kes sebegini (lihat perenggan 6).

(2) Kes plaintif adalah berkaitan masalah tentang pencerobohan yang timbul akibat daripada kegagalan defendan untuk menyediakan pelan sempurna yang menunjukkan sempadan antara bahagian defendan dan Monica Goh. Peguam bagi pihak defendan bagaimanapun berjaya memusnahkan kes plaintif berdasarkan keterangan dokumentar yang sezaman. Adalah dibuktikan bahawa plaintif telah, melalui juru ukur tanah, menyebabkan pelan pembahagian tersebut disediakan berkaitan defendan dan pemilik bersamanya, Monica Goh. Oleh itu, defendan sememangnya mengetahui di mana letaknya sempadan antara bahagian defendan dan Monica Goh. Oleh itu, jika berlaku pencerobohan, yang tidak mungkin berlaku, atas imbangan kebarangkalian, adalah disebabkan oleh sesuatu yang defendan lakukan atau tinggalkan. Seperti yang didapati oleh hakim yang bijaksana dalam perbicaraan awal, plaintif patut dipersalahkan. Ini adalah persoalan fakta semata-mata (lihat perenggan 7).

(3) Defendan mempunyai alasan baik unutk tidak bersetuju dengan terma-terma perjanjian variasi yang dicadangkan. Ia tidak menyebelahinya. Defendan adalah, berdasarkan fakta-fakta dalam kes ini, dijustifikasikan kerana enggan menyempurnakan perjanjian variasi itu (lihat perenggan 8).

(4) Hakim yang bijaksana betul mengatakan defendan dijustifikasikan kerana membatalkan perjanjian usahasama itu dan memutuskan plaintif telah melanggar kontrak. Oleh itu tidak terdapat merit dalam rayuan balas plaintif (lihat perenggan 9).

(5) Seksyen 55 Akta Kontrak 1950 tidak terpakai kepada fakta-fakta kes ini. Defendan telah memberikan surat kuasa wakil kepada plaintif. Menurut kll 9 dan 10 kepada surat kuasa wakil itu, plaintif boleh bertindak tanpa kerjasama defendan. Oleh itu ini bukan suatu kontrak yang mana janji plaintif tidak boleh dilaksanakan, ataupun ia pelaksanaan yang dituntutan tanpa defendna memenuhi janjinya. Plaintif mempunyai kuasa mutlak terhadap perkara yang berkaitan perancangan dan pembahagian dan tidak ada apa-apa lagi untuk defendan lakukan berkaitan perkara-perkara tersebut (lihat perenggan 11).

(6) Pelanggar kontrak harus membayar ganti rugi kepada pihak tidak bersalah. Namun, jika beliau telah membuat bayaran di bawah kontrak (yang bukan wang pendahuluan bagu belian harta boleh alih atau tak alih), pelanggar kontrak berhak 'set off' bayaran itu terhadap ganti rugi yang beliau perlu bayar. Namun, beliau tidak boleh mendapat balik apa-apa faedah yang beliau mungkin telah berikan kepada pihak yang tidak bersalah. Di mana beliau sendiri bersalah kerana melanggar suatu kontrak dan sebaliknya, pelanggar kontrak berada dalam kedudukan untuk mengambil kesempatan ke atas kesalahannya adalah bertentangan dengan prinsip dan polisi undang-undang (lihat perenggan 19). Bahkan dalam kes ini tiada peruntukan nyata dalam perjanjian usahasama itu yang membenarkan plaintif mengambil kesempatan ke atas pelanggarannya sendiri (lihat perenggan 20).]

Notes

For cases on assessment of damages in contract, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2837–2841.

For cases on damages for breach of contract, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2844–2858.

For a case on remedies for breach of contract, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 2352.

Cases referred to

Alghussein Establishment v Eton College [1991] 1 All ER 267 (refd)
Hitchins v Breslin [1913] TPD 677 (refd)
MP Army Welfare Housing Organisation v Sumangal Services Pvt Ltd AIR 2004 SC 1344 (refd)
Maneklal v Keshav AIR 1938 Bombay 71 (refd)
Menaka v Lum Kum Chum [1977] 1 MLJ 91 (refd)
Muralidhar Chatterjee v International Film Co Ltd AIR 1943 PC 34 (refd)
Moschi v Leo Air Services Ltd [1973] AC 331 (refd)
Rama Rao v Bashu Khan Saheb [1998] 2 CTC 363 (refd)
Shree Hanuman Cotton Mills v Tata Air Craft Ltd AIR 1970 SC 1986 (refd)
Smith Construction Co Ltd v Phit Kirivatna [1955] MLJ 8 (refd)
Suu Lin Cbong v Lee Yaw Seong [1979] 2 MLJ 48 (refd)
VK Kumaraswami Chettiar v PASV Karuppuswami Mooppanar AIR 1953 Mad 380 (refd)

Legislation referred to

Contracts Act 1950 ss 40, 54, 55, 65, 76

Appeal from: Summons No K275 of 1992 (High Court, Kota Kinabalu)

Vinayak Pradhan (John Kah and N Pathmavathy with him) (Jayasuria Kah & Co) for the appellant.
RR Sethu (David Fung with him) (Alex Pang & Co) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] The defendant owns a ¾ undivided share in a piece of land. The land is in Labuan. His co-proprietor is one Monica Goh. She owns the other 1/4 share. She is not a party to these proceedings. The plaintiff and Monica Goh by their mutual agreement notionally demarcated their respective shares in the subject land. I say 'notional' because there was no actual subdivision until January 1991. As for his 3/4 portion of the subject land, the defendant prepared a plan dividing it into three sections. The defendant wanted to develop only one of these three sections. He entered into a joint venture agreement with the plaintiff, a housing developer, to carry out the development. That agreement is dated 31 December 1980. Under the terms of the joint venture agreement, the plaintiff was to construct several units of houses at its own cost on the defendant's land and the defendant was to receive a portion of those units.

[2] The defendant also executed a power of attorney in the plaintiffs favour. It is also dated 31 December 1980. By its terms the defendant conferred on the plaintiff wide powers to deal with the land. Let me give an example that is of immediate relevance. Clauses 9 and 0 of the power say that the plaintiff is:

> 9 To have absolute power to apply for sub-division of the said land dividing the same into lots subsequently and for that purpose to sign and execute all documents and agreements.
>
> 10 To have absolute power to surrender the said land for sub-division and to accept such terms and offer and for that purpose to sign and execute all the necessary instruments to that effect.

[3] Initially the parties went forward on the joint venture agreement. Plans and amended plans were submitted. Construction commenced in 1982 but halted in November 1984. The project was never completed. That is because part of the construction encroached onto Monica Goh's portion. There were some negotiations between the plaintiff and the defendant. They came to naught. For some six years neither side did anything. Then, on 24 February 1990 the defendant's solicitors wrote to the plaintiff enquiring whether the plaintiff will resume work to complete the project. It further gave notice that failure to respond within seven days the project will be deemed abandoned. The plaintiff responded by a letter dated 16 March 1990. The essential part of that letter reads:

> We are pleased to advise you that we will get in touch with your client to discuss and negotiate with regard to the joint venture agreement. We will resume the construction of the project in the near future.
>
> We will appreciate very much if you could defer any court proceeding until we have an opportunity to discuss with your client.

[4] Then, on 1 August 1990 the defendant's solicitors wrote stating that as the plaintiff had failed to see the defendant nor resumed construction, the joint venture agreement was to be treated as having been terminated by repudiation. Later, the plaintiff issued writ. The defendant delivered his defence and counterclaim. At the trial, a substantial volume of oral and documentary evidence was produced before the judge. The learned judge who tried the case held that the defendant's termination of the joint venture agreement was justified and therefore lawful. He awarded the defendant damages. In short he found for the defendant. But he also went on to direct an assessment of the work that the plaintiff had done and ordered the defendant to pay the assessed value. The defendant has appealed against this part of the judge's order. The plaintiff has appealed against the dismissal of its claim. I find it convenient to deal with the plaintiff's cross appeal first.

[5] At the trial, the plaintiff's complaint was that the defendant was to blame for all of the difficulties that arose in relation to the encroachment onto the co-proprietor's portion of the subject land. The defendant's case is that it is all the plaintiffs fault. Counsel on both sides took us through all the relevant documents in the appeal record. The arguments were so careful that the hearing of this appeal took the best part of three days before us. After all the dust of conflict had settled it was

clear to us that this was quite a simple case. So we gave our decision at the close of submissions. We allowed the defendant's appeal and dismissed that of the plaintiff. The reasons for the decision now follow.

[6] I must begin by observing that most cases of breach of contract are fact sensitive. In other words, they turn on the individual facts of each case. They turn on the impression created by particular witnesses on the mind of a judge who makes his findings of fact based on the audio visual advantage he enjoys. Let me say at once that this is just such a case. Just look at the crucial facts.

[7] In a gist, the plaintiff's case is that the problem about the encroachment arose because of the defendant's failure to have a proper plan showing the demarcation between the defendant's portion and that of Monica Goh. Mr Vinayak Pradhan of counsel for the defendant was however able to demolish the plaintiffs case by reference to the contemporaneous documentary evidence. Mr Pradhan said that if you look at those documents you will find that it was the plaintiff who, through a land surveyor, caused to be prepared the subdivision plans with respect to the defendant and his co-proprietor, Monica Goh. I have looked at the documents again and I find myself in agreement with Mr Pradhan's argument. Now, what is the consequence? It is that the defendant well knew where the boundary lay between the defendant's part of the land and that of Monica Goh. So, if there was an encroachment, it could not, on a balance of probabilities, have been the result of anything the defendant did or omitted to do. As found by the learned judge at first instance, the blame must fall squarely at the plaintiffs door. This is, of course, is plainly a question of fact.

[8] Let me now move to another fact sensitive area in this case. According to its letter which I have already quoted in paragraph 3 of this judgment, the plaintiff said that it would communicate with the defendant. The defendant said that no contact was ever made. The trial judge accepted that evidence and found as a fact that the plaintiff had not made any attempt to have the impasse resolved. That finding must have put the plaintiff in a bad light in the mind of the primary judge. He said quite a bit about it in his judgment. Dato Sethu for the plaintiff submitted that the judge went wrong because he did not have any or any sufficient regard to what had happened before the six years had lapsed. Counsel referred us to the negotiations between the parties in respect of a variation agreement that had been prepared in draft and which the defendant had unreasonably refused to accede to. He submitted that the facts show that the plaintiff stopped work because of the defendant's unreasonable refusal to accede to the terms of the variation agreement. But if you look closely enough, the defendant had very good reasons for refusing to agree to the terms of the proposed agreement. They were plainly unfavourable to him. In my view, the defendant was, on the facts of this case, entirely justified in refusing to execute the variation agreement. I think that the question here is whether the parties behaved reasonably. The judge thought that the plaintiff acted unreasonably. This again is a question of fact.

[9] Now, there is another aspect to this part of the case. When giving his evidence, the plaintiff' main witness said that the reason the plaintiff had stopped work had

nothing to do with the defendant's refusal to agree to the terms of the variation agreement. It had stopped work because it needed the titles to the several subdivided parcels of the plaintiff's land. This version, of course, contradicts the plaintiff's case as presented to the trial judge. It cuts the ground from under the plaintiff's feet. Small wonder therefore that the judge formed an adverse view about the plaintiffs case and found for the defendant on the facts. Having read the printed and documentary evidence before hearing argument in this appeal and having re-read them for the purpose of writing this judgment, I find myself in agreement with the learned judge that the defendant was justified in terminating the joint venture agreement and holding the plaintiff in breach of contract. There is accordingly no merit in the plaintiff's cross appeal.

[10] One other point with regard to the plaintiff's cross appeal. It was submitted for the plaintiff that it could do nothing, without the defendant's cooperation, as regards the submission of the appropriate plan to the Labuan Municipal Council after the issue of encroachment arose. The defendant did not cooperate. So work on the project was halted. According to learned counsel for the plaintiff, this was a case to which s 55 of the Contracts Act 1950 applied. That section says this:

> When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, the promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which the other party may sustain by the non-performance of the contract.

[11] With respect I am unable to agree with learned counsel's argument. In my judgement, s 55 has no application to the facts of this case. You may recall that the defendant had given a power of attorney to the plaintiff. I have referred to it in para 2 of this judgment. Mark that, by virtue of cll 9 and 10 of that power, the plaintiff could act without the defendant's cooperation. So this is not a contract where the plaintiff's promise cannot be performed, or its performance claimed without the defendant fulfilling his promise. The plaintiff had, I will say at the risk of repetition, sole control over matters pertaining to planning and subdivision and there was nothing further for the defendant to do in respect of these matters.

[12] With that I now turn to Mr Pradhan's submission that the learned judge was wrong in directing an assessment of damages for the work done by the plaintiff. I begin with some fairly basic propositions that are sometimes overlooked. First, in every action for a breach of contract, there is an innocent party and a guilty party. Each party, of course, claims he or she is the innocent one and that it is the other who is guilty. In the normal case for a breach of contract — and this is a normal case — each side will in its pleaded case assert its justification for what it did and assert the opposite party's guilt. And a defendant normally does it by way of a counterclaim annexed to his or her defence. I may add in parenthesis that this is precisely what happened here. In such a case, there is only one party who can emerge as victor. If it is the defendant who was in breach of contract, then the only lawful order the court can make is to enter judgment for the plaintiff and to dismiss the defendant's counterclaim.

[13] Second, it is axiomatic that in the kind of case I have envisaged in the preceding paragraph, once a victor emerges at trial, there is no room to grant the vanquished any relief. The contract breaker, being responsible for the breach, can recover nothing in the absence of a specific agreement between the parties. It was argued for the plaintiff that the court has jurisdiction to order the innocent party to return to the contract breaker any advantage that the innocent party may have obtained under the contract, I am certain that no such proposition exists under our law. Of course you have the case of void contracts, such as moneylending contracts which when *discovered* to be void entitle the moneylender to have his principal back. See, *Menaka v Lum Kum Chum* [1977] 1 MLJ 91 which was explained by Wan Yahya J in an illuminating judgment in *Suu Lin Chong v Lee Yaw Seong* [1979] 2 MLJ 48. But that is entirely a different kettle of fish. In those cases, the contract is void. But in cases where a contract is broken, the contract is valid not void. What happens is that the obligation to perform the promises made is replaced by operation of law by an obligation to pay damages. But those damages fall to be assessed with regard to the nature of the promises exchanged between the parties.

[14] As Lord Reid said in *Moschi v Leo Air Services Ltd* [1973] AC 331:

> The Court of Appeal reached the same result by a different route. I am unable to accept some of their reasoning as to what happens when a contract is broken. In particular, I cannot agree that after accepted repudiation the contractual obligations still exist as obligations. For the breach of any contract the normal remedy is damages in money. The contract may have been to deliver say 100 tons of wheat. If the party fails to deliver somehow that obligation disappears and by operation of law is replaced by an obligation to pay money. So it appears to me that *when a contract is brought to an end by repudiation accepted by the other party all the obligations in the contract come to an end and they are replaced by operation of law by an obligation to pay money damages.* The damages are assessed by reference to the old obligations but the old obligations no longer exist as obligations. Were it otherwise there would be in existence simultaneously two obligations, one to perform the contract and the other to pay damages. But that could not be right. The only legal nexus remaining is the obligation to pay the damages; so here when the respondents elected to end the company's contract by treating their fundamental breach as a repudiation and accepting it, their right against the company became a right to get damages. (Emphasis added.)

[15] Dato Sethu however relies on the Privy Council decision in *Muralidhar Chatterjee v International Film Co Ltd* AIR 1943 PC 34 and argues that by virtue of ss 40, 54, 55, 65 and 76, since it was the defendant who terminated the contract, he must restore to the plaintiff the benefit he obtained under the contract. Accordingly, the learned judge was correct in directing the assessment. This in gist is his argument.

Having regard to the fact pattern in this case, I find it unnecessary to embark upon a discussion of the sections referred to. Neither do I find it useful to discuss the decision in *Muralidhar Chatterjee* at any length. That case:

> is simply authority for the proposition that in s 65, where the words 'voidable' or 'rescind' are used, they can be applicable not merely to cases when a contract is brought to an end ab initio for fraud or undue influence or some similar cause, but also to cases where one party elects to terminate a contract repudiated by the other party through anticipatory breach or rejection of its fundamental terms' per Lord Hailsham in *Linggi Plantations v Jegathesan* [1972] 1 MLJ 89.

Muralidhar Chatterjee v International Film Co Ltd was also explained by an unusually strong Bench (Rajamannar CJ and Venkatarama Aiyar J) of the Madras High Court in *VK Kumaraswami Chettiar v PASV Karuppuswami Mooppanar* AIR 1953 Mad 380 as follows:

> Considerable reliance was placed by the respondent on the decision of the Privy Council in *Muralidhar Chatterjee v International Film Co* (1943) 2 Mad LJ 369. There the appellant had entered into a contract with the respondents for distributing films in various areas and had paid a sum of Rs4000 as advance. On 1 December 1933, the appellant wrote a letter complaining that the defendants had committed several breaches of the contract and that he would have no more business dealings with them. After some correspondence, the respondents accepted the repudiation by letter dated 31 January 1937. Then the plaintiff filed an action for damages for breach of contract and also for the return of the advance. It was found that the defendants had not broken the contract and on that finding the claim for damages was dismissed. With reference to the claim for return of advance it was contended by the defendants that the plaintiff who was in default could not recover the same; while the plaintiff contended that as the contract had been rescinded by the respondents on 21 January 1937, he was entitled to its return under s 64, Contract Act. The Privy Council accepted this contention and held that the plaintiff was entitled to recover the advance amount and that the right of the defendants was to make a cross claim for damages against the appellants for breach of contract. The decision as such has no bearing on the point now under discussion but it is argued that the case was dealt with as one falling under s 39, Contract Act [s 40 of our Contracts Act]; that the repudiation by the appellant contained in his letter dated 1 December 1936 was held to give a right to the respondents to avoid the contract and the letter dated 31 January 1937 was treated as an acceptance of the repudiation by them. In the same manner, contends Mr N Rajagopala Aiyangar, the failure of the respondent to take delivery of the goods on 2 August 1943 gave the appellants only a right to avoid the contract and they not having done that, the contract stood. But the agreement which the Privy Council had to consider in *Muralidhar Chatterjee v International Film Ltd*, was a continuing contract involving mutual obligations and is similar to the one which came before the House of Lords in *Heyman v Darwins* (1942) AC 356. For the reasons already given, this decision cannot be taken as an authority for the contention that s 39 applies even when there is a refusal to perform the contract after the time for performance has arrived.

[16] In *Rama Rao v Bashu Khan Saheb* [1998] 2 CTC 363, K Sampath J after discussing the case of *Shree Hanuman Cotton Mills v Tata Air Craft Ltd* AIR 1970 SC 1986 said this:

> While dealing with that case, the Supreme Court referred to the decision in *Muralidhar Chatterjee v International Film Co Ltd* AIR 1943 PC 34 and held that restoration of benefit under s 64 of the Contract Act [our s 65] would arise only when there was no breach on the part of the person seeking such restoration. The situation here is also similar. In my view, the decision of the Supreme Court relied upon by the learned counsel for the appellants does not help the appellants at all.

[17] In my judgment, the decision in *Muralidhar*'s case is to be explained in this way. A contract breaker must pay damages to the innocent party. However, if he has made any payment under the contract (not being a true deposit for the purchase of movable or immovable property) the contract breaker is entitled to set off that payment against the damages he has to pay. However, he cannot seek to recover any benefit he may have conferred upon the innocent party where he is himself guilty of

a breach of contract. Were it otherwise, a contract breaker will be in a position to take advantage of his own wrong. This is against principle and the policy of the law.

[18] In *Alghussein Establishment v Eton College* [1991] 1 All ER 267, it was held that:

> The principle that in the absence of clear express provisions in a contract to the contrary it was not to be presumed that the parties intended that a party should be entitled to take advantage of his own breach as against the other party was not limited to cases where a party was relying on his own wrong to avoid his obligations under the contract but applied also where a party sought to obtain a benefit under a continuing contract on account of his breach.

It only remains for me to say that in the present instance there is no express provision in the joint venture agreement which permits the plaintiff to take advantage of its own breach.

[19] I must now deal with s 65 upon which the plaintiff relies. That section reads:

> When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore the benefit, so far as may be, to the person from whom it was received.

[20] You will see that the section speaks of 'any benefit' having been received by the party rescinding the contract. Accepting that it was the defendant who 'rescinded' the contract by terminating it, you still have the question as to whether he received any benefit under it.

[21] According to the evidence, there are some uncompleted structures on the defendant's land. They are in a pretty bad condition. Mr Pradhan says that the plaintiff has not conferred a benefit on his client. The structures are in fact a burden to him. The defendant's land has not been improved. It has been left in a derelict state. As observed by the court in *Maneklal v Keshav* AIR 1938 Bombay 71:

> if the result of improvement is to add to the permanent value of the property, then in equity a right for restitution or reimbursement arises in favour of such transferee in respect of the expenditure incurred by him in that behalf. The principle is recognised in s 64, Contract Act …

[22] Now, there is no finding by the learned trial judge that the incomplete structures improved the defendant's land by adding on to its permanent value. In the absence of such a finding, it was not open to the learned judge to direct an assessment as the benefit element is lacking in the case.

[23] Counsel for the defendant also argues that the joint venture agreement is an entire contract or as it is sometimes called a 'lump sum contract'. The principle that governs such contracts was stated by Spenser Wilkinson J in *Smith Construction Co Ltd v Phit Kirivatna* [1955] MLJ 8:

> With regard to the claim on a quantum meruit, the general rule is that if a contract is an entire one the plaintiff cannot sue until the work has been completed (see *Cutter v Powell* 6 TR 320). One of the exceptions to this general rule is where, the special contract being unperformed, a new contract has been implied from the conduct of the parties to pay remuneration commensurate with the benefit derived from partial performance. In the case of a building, the mere fact that the owner takes over possession and therefore to that extent the benefit of the contractor's work is not sufficient by itself to raise this implication (*Munro v Rutt* 8 E & B 738).

[24] I am in agreement with Mr Pradhan's submission. The joint venture agreement required the plaintiff to complete the whole project. The plaintiff did not do that. It cannot now be heard to say that it must be compensated for what it has done. It is just the same when I ask my cobbler to make me a pair of shoes. He must produce the pair. He cannot give me one shoe and ask me to pay him me half the price.

[25] There are two other authorities which support the view that the plaintiff in this case should receive nothing. First, there is *Hitchins v Breslin* [1913] TPD 677 where Wessels J said:

> The employer should not be enriched at the expense of the contractor, but the contractor should not get from the employer any profit unless he has scrupulously carried out what he undertook to do. To allow a contractor to claim the whole of the contract price and a quantum meruit for that part of the contract which he carried out defectively but failed to carry out according to the terms of his contract would be to do an injustice to the employer by stripping the contract of its mutuality. Voet (19, 2, 40) was strongly relied upon by Mr Tindall, but all that Voet says is that, as a general rule, if a locator derives no benefit from the work of a contractor who has not adhered to his contract the former need pay nothing. If, however, the locator has derived some monetary advantage from the unfinished work of the contractor he must pay the contractor for such benefit as he has obtained; and for this he may be sued by the appropriate action.
>
> If the locator has no use for the materials because the work has been spoiled by the contractor the latter can remove them. If, however, the locator uses the materials he must pay their actual value to the contractor, and if he uses them in the position in which the contractor has placed them he must also pay for the cost of labour required to place them in that advantageous position. If the foundations and walls of a building, placed on my ground under a building contract not carried to completion, are useful to me, and if I use them I must pay for the materials and the labour on the principle, natura aequum est neminem cum alterius detrimento fieri locupletiorem. In such a case, I need not pay the contract price but only the amount by which I have been enriched in possessing the materials placed as they are by the contractor's labour. *If the contractor has abandoned the contract then by English law he cannot claim for the value of materials or work unless there is evidence of a fresh contract: Sumpter v Hedges (67 LJ QB 545) . Nay, where a contract provides for stipulated work at a lump sum and such work is not done, but its equivalent or better work is effected, no claim for such substituted work can be sustained: Forman v 'The Lidderdale' (69 LJ PC 44)* . (Emphasis added.)

[26] Next, there is *MP Army Welfare Housing Organisation v Sumangal Services Pvt Ltd* AIR 2004 SC 1344 where SB Sinha J when delivering the judgment of the Supreme Court of India said: It is well-settled that, a builder renouncing his obligations could not claim substantial performance. In *Hudson's Building and*

Engineering Contracts at p 484, the law is stated as: A further overriding principle to be deduced from the cases, it is submitted, is that a party consciously in breach, a fortiori a party repudiating an obligation or abandoning work, should not be enabled to abuse the doctrine by maintaining that position while at the same time suing for remuneration under the contract. Thus in South Africa, there is long-standing authority that substantial performance is not available where work is abandoned, or the method of performance is inconsistent with an honest intention to carry out the work in accordance with the contract. *Sumpter v Hedges and Ibmac Ltd v Marshall (Homes) Ltd 206 EG 211* were clear cases of abandonment.

[27] For the best part of six years and even after the defendant's letter in early 1990 nothing happened. The plaintiff did no work. As found by the learned judge, the plaintiffs officers did not meet with the defendant. I think that this is a clear case of abandonment.

[28] Before concluding this judgment I wish to make one observation. It has to do with Muralidhar Chatteriee v International Film Co Ltd. No doubt, the principle there laid down does not apply to the facts of the instant appeal. So the correctness of the decision in that case is not res integra here. However, I must say with respect that that case does not accurately interpret the Indian equipollent of our ss 40, 54, 55, 65 and 76 of the Contracts Act. But a detailed discussion of that case for the purpose of revealing its infirmities must await an appropriate occasion. This is not the case in which it should be done.

[29] For the reasons already given, the defendant's appeal was allowed and the plaintiffs cross appeal was dismissed. I will not reproduce here the orders we made consequent upon the disposal of the appeals.

[30] My learned brother Hashim Yusoff and my learned sister Zaleha Zahari JJCA have seen this judgment in draft and have expressed their agreement with it.

Defendant's appeal allowed. Plaintiff's appeal dismissed.

Reported by Loo Lai Mee